No. 42423-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Brian Tauscher,

Appellant.

Lewis County Superior Court Cause No. 10-1-00314-7

The Honorable Judge Nelson Hunt

Appellant's Reply Brief

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I. THE TRIAL COURT SHOULD HAVE APPOINTED SUBSTITUTE COUNSEL BECAUSE MR. TAUSCHER'S RAISED A COLORABLE INEFFECTIVE ASSISTANCE CLAIM PRIOR TO SENTENCING, AND HIS APPOINTED ATTORNEY DID NOT DISPUTE HIS ALLEGATIONS.

The right to counsel includes the right to an attorney unhampered by conflicts of interest. *State v. Davis*, 141 Wash.2d 798, 860, 10 P.3d 977 (2000). Prior to sentencing, a defendant's motion to withdraw his or her guilty plea is a critical stage of the proceedings, regardless of whether or not the motion has merit. *State v. Chavez*, 162 Wash.App. 431, 439-440, 257 P.3d 1114 (2011); *State v. Pugh*, 153 Wash.App. 569, 579, 222 P.3d 821 (2009).[1] Denial of counsel on such a motion requires automatic reversal. *State v. Harell*, 80 Wash.App. 802, 805, 911 P.2d 1034 (1996).

Here, Mr. Tauscher brought a pre-sentencing motion to withdraw his plea. CP 69-79. He was therefore constitutionally entitled to the effective assistance of counsel to pursue the motion. *Chavez, at* 439-440. He made colorable, fact-specific claims of ineffective assistance that were not disputed by appointed counsel. CP 69-79; RP (8/25/10) 11-14. If true, these claims would have entitled him to withdraw his plea. *See, e.g., In re Isadore*, 151 Wash.2d 294, 88 P.3d 390 (2004) (misinformation regarding

[1] The same is not true of a post-judgment motion. *State v. Forest*, 125 Wash.App. 702, 707, 105 P.3d 1045 (2005).

direct consequences of plea); *State v. A.N.J.*, 168 Wash.2d 91, 225 P.3d 956 (2010) (ineffective assistance based on, *inter alia*, failure to investigate).

At least in connection with the motion, appointed counsel could not ethically provide the representation guaranteed under *Chavez*.[2] *See* RPC 1.7; *Harell.* To do so would have required appointed counsel to argue vigorously to the trial court that he himself had provided deficient performance. It may also have required him to testify against his own client, as occurred in *Harell.*

Contrary to Respondent's assertion, Mr. Tauscher is not asking for a constitutionally-based *per se* rule requiring appointment of new counsel whenever a defendant alleges his current attorney is ineffective.[3] *See* Brief of Respondent, p. 14-15 (citing *State v. Rosborough*, 62 Wash.App. 341, 814 P.2d 679 (1991)). If the defendant fails to articulate a specific complaint, or alleges conduct that wouldn't merit relief, the trial court would be free under the constitution to exercise its discretion to deny the

[2] Had the court appointed new counsel and then denied the motion, it is possible that Mr. Brown could have returned to represent Mr. Tauscher at sentencing.

[3] However, appointment of new counsel might be mandatory under court rule. *See* CrR 3.1, CrR 4.2(f), CrR 7.8, *and State v. Robinson*, 153 Wash.2d 689, 696, 107 P.3d 90 (2005).

appointment of substitute counsel.[4] This is consistent with *Rosborough,* in which the trial court determined that the asserted facts, even if true, did not merit relief. *Id, at* 346-348. In fact, the *Rosborough* court took pains to distinguish *Ellison,* a federal case which supports Mr. Tauscher's position. *Id, at* 348 (distinguishing *United States v. Ellison,* 798 F.2d 1102 (7th Cir.1986), *cert. denied,* 479 U.S. 1038, 107 S.Ct. 893, 93 L.Ed.2d 845 (1987)).

It is irrelevant that Mr. Brown may have aided Mr. Tauscher in preparing his *pro se* materials. *See* Brief of Respondent, pp. 15-16. First, it is not clear that Mr. Brown provided anything more than his stationery and his assistant's typing skills. Second, even if Mr. Brown drafted Mr. Tauscher's materials, any assistance he provided would be hampered by an actual conflict, as pointed out in *Ellison*: "if the allegations in defendant's motion were true, [counsel's] actions would be tantamount to malpractice." *Ellison, at* 1108.

Respondent does not address Mr. Tauscher's contention that the trial court erroneously applied the standard for post-judgment motions. *See* Appellant's Opening Brief, pp. 9-10. Brief of Respondent, pp. 12-18.

[4] Furthermore, any appointment of conflict counsel could be limited to pursuing the defendant's claim, with the assumption that the original attorney will continue on all other aspects of the representation.

The absence of argument on this point may be treated as a concession. *See In re Pullman,* 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009).

The trial judge should have appointed substitute counsel to investigate and pursue Mr. Tauscher's ineffective assistance claim. *Chavez, supra.* His failure to do so deprived Mr. Tauscher of the effective assistance of counsel at a critical stage. *Id.* The Judgment and Sentence must be vacated and the case remanded for appointment of new counsel. *Id.*

II. MR. TAUSCHER'S GUILTY PLEA WAS INVOLUNTARY.

Due process requires an affirmative showing that the defendant knew the direct consequences of her or his guilty plea. *Isadore, at* 302; *A.N.J., at* 113. Misinformation regarding a direct consequence renders a guilty plea involuntary. *Isadore, at* 302.

Here, Respondent does not dispute that Mr. Tauscher was misinformed as to his standard range.[5] *See* Appellant's Opening Brief, pp. 11-12; Brief of Respondent, pp. 18-21. Instead, Respondent suggests that Mr. Tauscher waived his right to withdraw his guilty plea on the basis of misinformation because he did not raise the issue after he was sentenced

[5] He was also misinformed as to the consequences of conviction had he proceeded to trial on the original charges. RP (8/25/10) 12-13.

but before he was resentenced. Brief of Respondent, p. 19-20 (citing *State v. Mendoza,* 157 Wash.2d 582, 141 P.3d 49 (2006)).

Mendoza does not apply to this case. In *Mendoza,* the defendant learned prior to sentencing that he'd been misinformed regarding his offender score. At sentencing, he sought to withdraw his plea based on dissatisfaction with his attorney, but did not mention the misinformation regarding his standard range. *Id, at* 585-586. The Court held that, under these circumstances, the issue had been waived. *Id, at* 592.

Here, by contrast, Mr. Tauscher's motion to withdraw his guilty plea was summarily denied and he was sentenced before the error in his offender score was recognized. RP (8/25/10) 12-22; RP (7/26/10) 4-12. Months later, the prosecutor conceded that one of Mr. Tauscher's prior convictions had been erroneously included in the offender score and a contested hearing was held regarding another prior conviction. At the conclusion of the hearing the court accepted the state's concession, ruled in favor of the prosecution regarding the contested issue, and sentenced Mr. Tauscher accordingly. RP (7/26/10) 8-13; CP 23.

Thus the error in Mr. Tauscher's standard range was not raised prior to sentencing; instead, it was raised several months after sentencing. *Cf. Mendoza.* He did not even have the theoretical opportunity to argue that his plea had been involuntary until the court accepted the state's

concession regarding one prior conviction and ruled in favor of the prosecution on the other. Even so, when asked for comment at the resentencing hearing—which followed immediately upon the court's ruling—Mr. Tauscher reasserted his dissatisfaction with his first attorney and mentioned his prior convictions, offender score, and standard range:

> THE DEFENDANT: ...I agreed to one thing, I received something totally different... If my attorney would have done his job in the first place, I wouldn't be here now. I feel that I should be able to get a lower range.
> THE COURT: And your complaint about your attorney is based upon what?
> THE DEFENDANT: He didn't do his job... I asked him to run the–check the points comparable to California. He never did that. There's—there's a lot of other issues along with that too.
> RP (7/26/10) 12-13.

Under these circumstances, Mr. Tauscher's failure to renew his motion on the basis of the misinformation should not be held against him.

Mr. Tauscher was misinformed about his standard range (and the consequences of conviction on the original charges). Because of this, his guilty plea was involuntary. *Isadore, at* 302. His conviction must be reversed and the case remanded to the trial court for a new trial. *Id.*

III. MR. TAUSCHER'S "GRAND THEFT" CONVICTION IS NOT COMPARABLE TO A WASHINGTON FELONY.

The prosecution bears the burden of proving the existence and comparability of out-of-state convictions. *State v. Ford*, 137 Wash.2d 472, 480, 973 P.2d 452 (1999). The out-of-state conviction at issue here is

"Grand Theft" under California Penal Code Section 487a ("Grand theft; stealing, transporting, appropriating, etc., carcass of animal"). The statute provides:

> (a) Every person who shall feloniously steal, take, transport or carry *the carcass* of any bovine, caprine, equine, ovine, or suine animal or of any mule, jack or jenny, which is the personal property of another, or who shall fraudulently appropriate such property which has been entrusted to him, is guilty of grand theft.
>
> (b) Every person who shall feloniously steal, take, transport, or carry any portion of *the carcass* of any bovine, caprine, equine, ovine, or suine animal or of any mule, jack, or jenny, which has been killed without the consent of the owner thereof, is guilty of grand theft.

California Penal Code Section 487a (emphasis added). The comparable Washington offense was alleged to be Theft of Livestock under former RCW 9A.56.080 (1995).

The California statute covers only the theft of a dead animal's body.[6] *People v. Gardner,* 90 Cal.App.3d 42, 47, 153 Cal.Rptr. 160 (1979). No published opinion has ever applied Washington's Theft of Livestock statute to animal carcasses. Furthermore, "livestock" means "the horses, cattle, sheep, and other useful animals kept or raised on a farm or ranch." *Dictionary.Com*, based on *The Random House Unabridged*

[6] Washington does not have a statute dealing specifically with theft of animal carcasses; such thefts are criminalized by the general theft statutes. *See* RCW 9A.56.030; RCW 9A.56.040; RCW 9A.56.050. Washington's Theft of Livestock is more akin to California Penal Code Section 487g, which relates to the theft of live animals.

Dictionary (Random House, 2011). It does not mean the carcasses of such animals.

This is consistent with the language of the statute, which made a person guilty of the offense if s/he "takes, leads, or transports away, conceals, withholds, slaughters, or otherwise appropriates any *horse, mule, cow, heifer, bull, steer, swine, or sheep.*" Former RCW 9A.56.080 (1995) (emphasis added). A horse is not a horse carcass; a mule is not a mule carcass; a cow is not a dead cow, etc. Nor does the list conclude with the language "or the carcass of any such animal," or a phrase such as "whether living or dead."

The statute is clear. Section 487a is therefore not comparable to Theft of Livestock under former RCW 9A.56.080 (1995). The trial court erred by finding the two offenses comparable. RP (7/26/11) 7-8.

Respondent's argument—that the word "livestock" encompasses animal carcasses—ignores the plain language of the statute itself. Brief of Respondent, p. 24. Respondent does not cite to any authority that specifically defines livestock to include animal carcasses.[7] Nor does Respondent suggest that the word "horse" also refers to horse carcasses,

[7] Respondent's reference to "deadstock," which is defined in opposition to "livestock," does not support Respondent's position. Brief of Respondent, p. 24. The fact that "deadstock" does not include live animals doesn't mean that "livestock" includes dead animals.

"mule" to mule carcasses, etc. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wash.App. 751, 779, 150 P.3d 1147 (2007).

Because the offenses are not comparable, the "Grand Theft" conviction should not have been included in the offender score. The case must be remanded for resentencing with an offender score of five. *In re Cadwallader*, 155 Wash.2d 867, 878, 123 P.3d 456 (2005).

IV. THE SENTENCING COURT'S FINDING REGARDING MR. TAUSCHER'S PRESENT OR FUTURE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS IS NOT SUPPORTED BY THE RECORD.

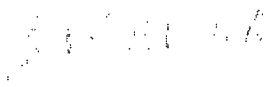
In light of the prosecution's concession, Mr. Tauscher rests on the argument set forth in the Opening Brief.

CONCLUSION

Mr. Tauscher's conviction must be reversed and the case remanded. In the alternative, the sentence must be vacated and the case remanded for appointment of new counsel, or for resentencing with an offender score of five.

Respectfully submitted on March 16, 2012,

BACKLUND AND MISTRY



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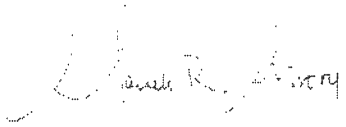

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Sara Beigh
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 16, 2012.

Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

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